

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DEBRA QUINN,

Plaintiff,

V.

CITY OF VANCOUVER,

Defendant.

CASE NO. C17-5969 BHS

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS MATTER is before the Court on Magistrate Judge Creatura's Report and

Recommendation (“R&R”), Dkt. 324, recommending the rulings on the parties’ pending summary judgment motions, Dkts. 260, 262, 266, and 268. The parties and the Court are familiar with the long factual and procedural history of this case, and the Court need not repeat it here.

Defendant City of Vancouver seeks summary judgment on two claims Quinn first asserted after she was terminated by the City: Claim 7, a § 1983 claim asserting that the City violated her Fourteenth Amendment due process rights with respect to her liberty interest in her reputation by failing to provide her the opportunity for a “name-clearing hearing,” and Claim 8, a state law claim asserting that the City discharged her in violation

1 of public policy. Dkt. 260. The R&R recommends granting the motion as to Quinn's due
2 process claim because Quinn has not established that she ever requested a name-clearing
3 hearing, even though she was entitled to one. Dkt. 324 at 11–12. The R&R recommends
4 denying the City's motion as to Quinn's discharge in violation of public policy claim,
5 because her Title VII (42 U.S.C. § 2000e) and Washington Law Against Discrimination
6 (RCW Chapter 49.60, "WLAD") claims are not "exclusive" remedies and they do not
7 effectively preempt her state law discharge in violation of public policy claim. Dkt. 324
8 at 14–16.

9 The City does not object to the denial of its motion for summary dismissal of
10 Quinn's discharge in violation of public policy claim. The R&R's recommendation on
11 that issue is therefore **ADOPTED** and the City's Motion for Summary Judgment on
12 Quinn's state law discharge in violation of public policy claim, Dkt. 260, is **DENIED**.

13 Quinn objects to the former recommendation, claiming that she was not required
14 to request a name-clearing hearing; the onus was on the City to offer her one before
15 terminating her for reasons that impugned her professional reputation. Dkt. 329 at 2.
16 Quinn's objections are discussed below.

17 Quinn seeks partial summary judgment on her Title VII and WLAD Retaliatory
18 Discharge claims. Dkt. 262. The City argues that she did not even assert such claims, and
19 that even if she had she is not entitled to judgment as a matter of law on them. Dkt. 289 at
20 2. The R&R recommends denying Quinn's motion, without resolving whether she
21 effectively asserted the claims. Dkt. 324 at 19. Quinn objects to the R&R on this point,
22 arguing that while the R&R implicitly recognized that she stated such claims, it did not

1 “clearly recognize” that her Amended Complaint asserts retaliatory discharge claims
2 under Title VII and WLAD. Dkt. 329 at 10. She asks this Court to so conclude, but she
3 does not object to the R&R’s recommended denial of her summary judgment motion on
4 these claims. *Id.* at 11. The City strenuously opposes an “after-the-fact petition for a sua
5 sponte declaration” that Quinn asserted claims that are facially not in her operative
6 complaint. Dkt. 330 at 1.

7 Defendants Young and Potter seek summary judgment on Quinn’s WLAD
8 Retaliation claims against them. Dkts. 266 and 268. They also seek dismissal of Quinn’s
9 claim for punitive damages, arguing that such damages are not permitted under
10 Washington law. The R&R recommends denying the motions because there is
11 circumstantial evidence supporting Quinn’s claim that the defendants’ proffered reasons
12 for their actions were pretextual. Dkt. 324 at 31. It also recommends denial of Potter’s
13 motion for summary judgment on Quinn’s claim that he discriminated against her by
14 failing to promote her, based largely on the same evidence. *Id.* at 32–38. Young and
15 Potter object to the R&R, Dkt. 328, and ask the Court to grant their summary judgment
16 motions. Young and Potter’s objections are discussed below.

17 Quinn does not object to the dismissal of her punitive damages claims against
18 Young and Potter. The R&R dismissing such claims is **ADOPTED**, and Quinn’s punitive
19 damages claims against Young and Potter are **DISMISSED** with prejudice.

20 The R&R is **ADOPTED** as to all proposed resolutions that are not the subject of
21 an objection. The parties’ objections to the R&R’s proposed resolution of their respective
22 motions are discussed in turn.

I. DISCUSSION

A. Rule 72 standard.

A district judge must determine de novo any part of a magistrate judge's proposed disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3). A proper objection requires specific written objections to the findings and recommendations in the R&R. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Objections to a R&R are not a vehicle to relitigate the same arguments carefully considered and rejected by the magistrate judge. *See, e.g., Fix v. Hartford Life & Accident Ins. Co.*, CV 16-41-M-DLC-JCL, 2017 WL 2721168, at *1 (D. Mont. June 23, 2017) (collecting cases).

B. The City's Motion for Summary Judgment on Quinn's § 1983 liberty interest due process claim is GRANTED.

The R&R correctly determined that due process entitled Quinn to a name-clearing hearing related to her termination for reasons that reflected poorly on her reputation. The parties agree that Quinn did not ask for such a hearing, and that the City did not offer her one. The R&R recommends granting the City's summary judgment motion, Dkt. 260, dismissing with prejudice Quinn's Fourteenth Amendment claim for deprivation of her liberty interest in her reputation without due process. Dkt. 324 at 39. It concludes that while she had a right to a name-clearing hearing, she failed to demonstrate she availed herself of that right. Dkt. 324 at 11 (citing *Reiber v. City of Pullman*, 918 F. Supp. 2d 1091, 1102 (E.D. Wash. 2013) ("a plaintiff who fails to request a name-clearing hearing

1 is precluded from asserting a substantive due process claim on an injury to reputation
 2 theory").

3 Quinn objects, arguing that the City was required to offer her an opportunity to
 4 clear her name and reputation when it terminated her for unprofessional and unethical
 5 behavior as its attorney. Dkt. 329. The City argues that no binding case has ever held that
 6 a plaintiff may assert such a claim based on the lack of a hearing when she did not ask for
 7 one. Dkt. 330.

8 When a government employee is terminated for reasons that impugn the
 9 employee's character, her liberty interest in her reputation entitles her to a name-clearing
 10 hearing. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972). Federal
 11 district courts in this district and state have recognized the dearth of published cases here
 12 addressing whether an employee must request a name-clearing hearing before she may
 13 sue for the deprivation of her liberty interest:

14 Although there does not appear to be a published opinion directly on point
 15 in the Ninth Circuit, several circuit courts have ruled that a plaintiff who
 16 fails to request a name clearing hearing is precluded from asserting a
 17 substantive due process claim on an injury to reputation theory. *See Quinn*
v. Shirey, 293 F.3d 315, 322 (6th Cir. 2002) ("[B]efore asserting [a] liberty
 18 interest claim, [a] Plaintiff [is] required to show that he requested a name-
 19 clearing hearing and was denied that opportunity."); *Gillum v. City of*
Kerrville, 3 F.3d 117, 121 (5th Cir. 1993) (listing a request for name-
 clearing hearing and a subsequent denial of that request as elements of
 substantive due process claim); *Winskowski v. City of Stephen*, 442 F.3d
 1107, 1110 (8th Cir. 2006).

20 *Reiber v. City of Pullman*, 918 F. Supp. 2d 1091, 1102 (E.D. Wash. 2013); *see also*
 21 *Humann v. City of Edmonds*, No. 13-cv-101-MJP, 2014 WL 4161974 at *10 (W.D.

1 Wash. Aug. 19, 2014). The R&R relied on these authorities in recommending the
 2 dismissal of Plaintiff's Fourteenth Amendment claim. Dkt. 324 at 11.

3 Quinn claims that these cases are distinguishable—several of them involved
 4 plaintiffs (including Reiber) who were offered and declined such a hearing—and
 5 similarly argues that there is not a binding case holding that she was required to ask for a
 6 hearing. Dkt. 329 3–5. She cites other out-of-district cases holding that the terminated
 7 employee is entitled to notice of the right to a hearing. *Id.* at 5–8 (citing *O'Donnell v.*
 8 *Barry*, 148 F.3d 1126, 1132 (D.C. Cir. 1998); *Buxton v. Plant City*, 871 F.2d 1037, 1046
 9 (11th Cir. 1989); and others)).

10 The most thorough, and persuasive, analysis of the issue is the Eighth Circuit's in
 11 *Winskowski*.¹ There, as here, the terminated employee did not seek a name-clearing
 12 hearing, and the government employer did not offer one. *Id.* at 1111. The issue, then, was
 13 whether authorities holding that one who was offered but failed to avail themselves of a
 14 hearing has not been deprived of due process as a matter of law applied equally where the
 15 employee failed instead to seek such a hearing. The Eighth Circuit held that it did:

16 Unlike the employer in *Schleck*, [the City] did not unilaterally offer
 17 Winskowski a name-clearing hearing. Accordingly, we must decide
 18 whether the principle enunciated in *Schleck* applies with equal force where
 19 the employer never offered a hearing, but the employee nevertheless failed
 20 to ask for one. We hold that it does. **Nothing in our jurisprudence
 21 suggests that a government employee can legitimately sue for
 22 deprivation of the right to a post-termination hearing where he never
 asserted the right before suing for damages.** Allowing an employee to
 claim damages for being deprived of a hearing never requested would
 greatly expand government employers' potential liability and force such

¹ *Winskowski* distinguished *O'Donnell*, which dealt with a lawsuit seeking a name-clearing hearing as a remedy. 442 F.3d at 1111.

1 employers prophylactically to offer name-clearings **when it is not at all**
 2 **clear that the employee is entitled to—or even desires—one.** It would
 3 also reward employees for lying in wait and later asserting a right that the
 4 employer had no reason to suspect the employee wanted to exercise in the
 5 first place. Although it appears that we have not directly answered this
 6 question before, we agree with the case law developed in other circuits that
 7 holds that **an employee who fails to request post-termination process**
 8 **cannot later sue for having been deprived of it.**

9
 10 *Winskowski*, 442 F.3d at 1111 (citing *Schleck v. Ramsey County*, 939 F.2d 638, 643 (8th
 11 Cir. 1991); *Quinn*, 293 F.3d at 321–22; *Rosenstein v. City of Dallas*, 876 F.2d 392, 396
 12 (5th Cir. 1989)) (emphasis added); *see also Reiber*, 918 F. Supp. 2d at 1102 (“Th[is]
 13 reasoning . . . applies with greater force” where plaintiff was expressly offered but
 14 declined a hearing.). The Court finds this reasoning sound generally, and in the context of
 15 this case.

16 Plaintiff Quinn is an attorney, she was represented by an attorney, and she was
 17 already embroiled in this litigation when she was terminated. The City suggests that
 18 Quinn did not want a name-clearing hearing—a public airing of the charges against her
 19 and her response—because a deprivation claim must also demonstrate that the
 20 “stigmatizing” basis for the termination was false. The City claims that Quinn violated
 21 her duties to her client (the City) when she filed a “whistleblower” complaint against it,
 22 opining that the City was discriminating and retaliating against its female employees in
 23 violation of Title VII and other statutes. The City argues it terminated Quinn for violating
 24 her ethical responsibilities to it, and that while these reasons impugn Quinn’s professional
 25 reputation, she has not shown and cannot show that they were untrue. They argue
 26 persuasively that Quinn cannot meet her burden of demonstrating that they were

1 stigmatizing or defamatory, or otherwise untruthful. *See* Dkt. 260 at 13, 16–19; Dkt. 330
 2 at 4 (quoting Judge Creatura’s R&R, Dkt. 324 at 11); *see also Campanelli v. Bockrath*,
 3 100 F.3d 1476, 1484 (9th Cir. 1996) (“In order to state a due process claim, [Plaintiff]
 4 also must allege that the defendants’ statements were substantially false.”).

5 Quinn’s failure to request a name-clearing hearing is fatal to her Fourteenth
 6 Amendment claim that the City deprived her of a liberty interest in her reputation without
 7 due process. The R&R on this point is **ADOPTED**. The City’s Motion for Summary
 8 Judgment on Quinn’s Fourteenth Amendment claim (Claim 7), Dkt. 260, is **GRANTED**
 9 and that claim is **DISMISSED** with prejudice.

10 **C. Quinn did not assert retaliatory *discharge* claims under Title VII or WLAD
 and her Summary Judgment Motion on those claims is DENIED.**

11 Quinn seeks summary judgment on what she asserts are retaliatory discharge
 12 claims under Title VII (“Claim 3”) and WLAD (“Claim 4”), both based on her 2019
 13 termination. Dkt. 262 at 2. The City asserts that Quinn never asserted such claims. Dkt.
 14 289 at 2–5. The R&R recommends denying the motion. Dkt. 324 at 19.

15 Quinn sued in 2017, alleging discrimination in the way she was treated at work
 16 and passed over for the Vancouver City Attorney position. Among other things, she
 17 asserted claims for retaliation under Title VII and WLAD (Claims 3 and 4 in her initial
 18 complaint, Dkt. 1). In June 2019, the City terminated Quinn, based on its claim that she
 19 violated her professional and ethical duties to it, her client.

20 In August 2019, Quinn sought leave to supplement her complaint to add two
 21 claims based on her termination. Dkts. 141 and 141-2. She sought to add a § 1983
 22

1 Fourteenth Amendment claim asserting that the City deprived her of her liberty interest in
 2 her reputation without due process by failing to provide her a name-clearing hearing, and
 3 a state law claim for wrongful discharge in violation of public policy. *Id.* The defendants
 4 opposed amendment. Dkts. 150 and 152. Specifically, the City argued that Quinn was
 5 required to file a new EEOC complaint before asserting a Title VII claim for retaliatory
 6 discharge—a claim different than, and based on different facts than, her previously-
 7 asserted Title VII retaliation claim, which was the basis of a pre-suit and pre-termination
 8 EEOC charge and right to sue letter. Dkt. 150. In her Reply, Dkt. 153, Quinn expressly
 9 disavowed any effort to assert a new Title VII claim based on her termination; she was
 10 instead asserting a Section 1983 claim, which has no pre-claim prerequisites:

11 However, Plaintiff's Equal Protection² claim is not a Title VII claim. The
 12 EEOC charge requirement of 42 U.S.C. § 2000e-5(e) applies by its own
 13 terms only to claims under "this section," i.e., 42 U.S.C. § 2000e. In
 14 contrast, Plaintiff's new Equal Protection claim is brought under a different
 15 section, 42 U.S.C. § 1983. *Fort Bend* did not address § 1983 claims at all,
 16 and Plaintiff is not aware of any authority requiring that § 1983 claims be
 17 submitted to the EEOC.

18 Dkt. 153 at 5.

19 On August 21, 2019, the Court allowed Quinn to amend her complaint to assert a
 20 § 1983 Fourteenth Amendment liberty interest, due process claim, based on the lack of a
 21 name-clearing hearing. It recognized that the newly-alleged facts *potentially* supported a
 22 Title VII retaliatory discharge claim, but concluded that since she was not asserting such

21 ² The "Equal Protection" reference is unclear. Quinn sought to and ultimately did assert a
 22 Fourteenth Amendment claim based on the deprivation of her liberty interest in her reputation
 without due process. *See* Dkt. 172 at 12. She has not asserted an Equal Protection claim.

1 a claim, that statute's administrative exhaustion (an EEOC charge and a right to sue
 2 letter) were not required before she asserted her new § 1983 claim. Dkt. 171 at 9 ("[T]he
 3 City has failed to establish as a matter of law that claims based on facts which *could* form
 4 the basis of a Title VII violation, but *are not alleged under Title VII*, must be
 5 administratively exhausted under Title VII.") (emphasis added).

6 The Court also agreed with the City that Quinn could not yet assert her state law
 7 termination in violation of public policy claim because she had not provided the required
 8 60 days' pre-claim notice. *Id.* at 8. It ruled that when that period was complete, she could
 9 again supplement her complaint to assert the state law claim. *Id.* at 10. Quinn filed her
 10 First Amended Complaint³ the next day. Dkt. 172. In October 2019, Quinn supplemented
 11 her complaint again, without opposition, after the pre-claim notice period expired for her
 12 discharge in violation of public policy claim. Dkts. 184-2 and 186. Her Second Amended
 13 Complaint, Dkt. 186, is the operative complaint.

14 Quinn's Title VII and WLAD retaliation claims have remained unchanged in all
 15 iterations of her complaint. Her Title VII retaliation claim has consistently asserted only
 16 that

17 Defendants retaliated against QUINN in violation of 42 U.S.C. §2000e-17
 18 because of QUINN's complaints of Defendants' unlawful conduct by
 19 placing QUINN on involuntary leave for nearly four months; publishing
 20 stigmatizing statements about QUINN to her colleagues while she was on
 21

22 ³ Quinn's First Amended Complaint, Dkt. 172, differs from the her proposed, red-lined
 23 version, Dkt. 141-2, because the Court dismissed other claims and defendants on summary
 24 judgment in the interim. Dkt. 170. Quinn's § 1983 Fourteenth Amendment claim, Claim 7 in her
 25 First Amended Complaint, Dkt. 172, is substantively identical to the proposed version, Dkt.
 26 141-2, and to the claim that remained in both iterations of her Second Amended Complaint,
 27 Dkts. 184-2 and 186.

1 forced leave; delaying investigation of her discrimination and hostile
2 workplace complaints until after the City's other pending gender
3 discrimination claims were resolved; delaying QUINN's merit pay increase
4 for three months after she should have received it; and altering QUINN's
5 regular workload.

6 Dkt. 186 at 10; *see* Claims 3 and 4 in Dkts. 1, 141-2, 172, and 184-2. It is undisputed that
7 Quinn did not make a EEOC charge based on her termination, and she persuasively
8 denied that she was seeking to add the claims upon which she now seeks summary
9 judgment. Indeed, she does not even object to the R&R's recommended denial of that
10 motion; she instead objects that it did not "find" that she had in fact asserted such claims.
11 Dkt. 329 at 10.

12 Quinn's attempt to assert, in an objection to an R&R, claims that are not in her
13 Second Amended Complaint, is procedurally improper and ineffective. The R&R's
14 recommended denial of the Motion is **ADOPTED**, Quinn's Motion for Summary
15 Judgment, Dkt. 262, is **DENIED**, and the Court **HOLDS** that Quinn has not asserted
16 retaliatory discharge claims under Title VII or WLAD.

17 **D. Young and Potter's Motions for Summary Judgment are DENIED.**

18 Defendants Young and Potter seek summary judgment on Quinn's remaining
19 WLAD retaliation claims against them. Dkts. 266 and 268. They acknowledge that the
20 Court previously denied their similar motions on this claim. *See* Dkt. 170. They assert,
21 however, that subsequent discovery has only demonstrated that their reasons for placing
22 Quinn on paid administrative leave were legitimate and non-pretextual. Dkts. 266 and
268.

1 The R&R recommends denying the individual defendants' summary judgment
2 motions, concluding that Quinn had established her *prima facie* retaliation claim, and that
3 questions of fact regarding the defendants' legitimate, non-pretextual reasons for their
4 adverse employment action precluded summary judgment. Dkt. 324 at 31.

5 Young and Potter object, arguing that the R&R incorrectly "found" that they failed
6 to provide additional evidence that their reason for placing Quinn on paid administrative
7 leave was legitimate and not pretextual, Dkt. 328 at 2. They argue the R&R incorrectly
8 concluded that Potter's allegedly derogatory comment about women, coupled with
9 reasonable inferences from other circumstantial evidence supports the conclusion that
10 gender played a role in their decision. *Id.* at 4. They (like the City) emphasize that Quinn
11 engaged in behavior adverse to her client's interests and in violation of her duties as an
12 attorney, *id.* at 8.

13 The defendants' arguments and evidence are persuasive, and they may ultimately
14 prevail. But they still do not lead to the conclusion that they are entitled to judgment as a
15 matter of law on Quinn's retaliation claims against them. The rich and lengthy factual
16 context of Quinn's employment, her leave (and her ultimate dismissal) will necessarily
17 await a jury's fact-finding. This is true for the legitimacy of the defendants' purported
18 non-discriminatory and non-pretextual reasons for their actions.

19 The R&R's recommended denial of Young and Potter's summary judgment
20 motions is **ADOPTED**, and those Motions, Dkts. 266 and 268, are **DENIED**.

21 The R&R is **ADOPTED**.
22

1 The City's Motion for Summary Judgment, Dkt. 260, is GRANTED in part and
2 DENIED in part. Quinn's Fourteenth amendment claim is **DISMISSED** with prejudice.

3 Quinn's Motion for Summary Judgment, Dkt. 262, is **DENIED**, and her request
4 for the Court to find she asserted Title VII and WLAD retaliatory discharge claims is
5 **DENIED**.

6 Young and Potter's Summary Judgment Motions, Dkts. 266 and 268 are
7 **DENIED**.

8 IT IS SO ORDERED.

9 Dated this 15th day of September, 2021.

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BENJAMIN H. SETTLE
United States District Judge